No. 168.

Brief of Paige for D. C.

Supreme Court of the United States,

NUMBER 168 OF OCTOBER TERM, 1897.

Filed Dec. 15, 1897.

AMERICAN SURETY COMPANY,
Plaintiff in Error,

against

FREDERICK N. PAULY,
Defendant in Error.

O'BRIEN CASE.

Brief for Defendant in Error.

IN THE

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Defendant in Error.

O'Brien Case.

BRIEF FOR DEFENDANT IN ERROR.

Abstract or Statement of the Case.

FIRST HEAD: *Condition and Nature of the Action.*

Writ of error to the Circuit Court of Appeals for the Second Circuit, bringing up a judgment of that Court which affirmed a judgment of the Circuit Court for the Southern District of New York—a judgment for money entered upon a verdict of a jury, which had been rendered in the favor of the plaintiff below.

The action was brought upon a paper writing under seal, called therein a "Bond," made by the plaintiff in error, by which it bound itself to "make good and reimburse to the" California National Bank, "all and any pecuniary loss sus-

tained by" it, "of moneys, securities, or other "personal property in the possession of" one George N. O'Brien, its cashier, "or for the possession of which he is responsible, by any act of "fraud, or dishonesty, on" his "part, in connection with the duties of the office or position hereinbefore referred to," * * * * and "occurring during the continuance of this Bond, and "discovered during said continuance, or within "six months thereafter, and within six months "from the death or dismissal, or retirement of," said O'Brien "from the service of the" employer. The paper writing also contained the following: "It being understood that a written statement of "such loss, certified by the duly authorized officer "or representative of the Employer, and based "upon the accounts of the Employer, shall be "*prima facie* evidence thereof" (fols. 29–30).

Also the following:

"That the company shall be notified in writing "at its office, in the City of New York, of any act "on the part of the Employee, which may involve "a loss for which the Company is responsible hereunder, as soon as practicable after the occurrence "of such act shall have come to the knowledge of "the Employer. That any claim made in respect "of this Bond shall be in writing, addressed to the "Company, as aforesaid, as soon as practicable "after the discovery of any loss for which the "Company is responsible hereunder, and within six "months after the expiration or cancellation of "this Bond, as aforesaid" (fols. 32–3).

It was also provided in this paper writing, that its term should be for twelve months, ending on the first day of July, 1892, at noon (fol. 29), and that

the plaintiff in error should not be responsible under it to a greater amount than fifteen thousand dollars (fol. 34).

The defendant in error is receiver of the concerns of the California National Bank.

An issue made by a complaint which alleged loss from acts of O'Brien insured against as above and an answer denying the same, was tried to a jury which rendered a verdict in favor of the defendant in error for fifteen thousand dollars, with interest from three months after notice had been given.

The judgment entered upon that verdict was affirmed by the Court of Appeals for the Second Circuit, and the judgment of the latter Court is now brought here.

SECOND HEAD: *The Proofs.*

The 66th, 71st and 72d assignments of error are that at the close of the plaintiff's case, the Judge erroneously denied a motion to dismiss the complaint, and that at the close of the testimony the Judge erroneously denied a motion to dismiss the complaint and a motion to direct a verdict for the defendant (fols. 872, 875).

These motions were made on the grounds that no acts of fraud or dishonesty on the part of O'Brien had been proved; that the plaintiff had not shown that the alleged loss was discovered within the continuance of the bond or within six months thereafter, nor within six months from the death, dismissal or retirement of the employee; and that the defendant was not notified as soon as practicable (fols. 389–91, 513).

As to the acts of dishonesty and the loss.

On the morning of the thirteenth of October, 1891, one John W. Collins, then and for a long time before president of the bank, owed the bank about three hundred thousand dollars—to be exact, $301,728.22.

This is got at from the proof as follows:

His indebtedness on the twelfth of November was $374,978.22 (fols. 313, 819).

Less credits of 13 and 14 October - - $45,000 (fol. 314)

Less other credits to 10 November - - $28,250— 73,250.00 (fol. 835)

$301,728.22

The Court should be informed that there are misprints in the dates of the two accounts printed on pages 247 to 281. On page 251 the date "1893" should be 1891. On pages 252, 253, 254, 255, 256 and 257 the six dates "1890" should be each 1889. On page 258 the first date "1890" should be 1889. In other words, the account should run consecutively from 19 Jan., 1888, at page 247 to 10 November, 1891, at page 275. On the other account, on page 277 the "1892" should be "February," and the "1893" should be "March." On page 278 the "1893" should be "March," and the 1893 should be "May." On page 279 the "1886" should be June and the "1887" should be 1891. On pages 280 and 281 the two dates "1887" should each be 1891. In other words the account should run consecutively from the first of November, 1890, on page 276, to January, 1892, on page 281. The mistake in the Collins account has come from the fact that the months are numbered in the original "2" for February "3" for March, and so on, and the printer has prefixed "189," March, "1893," and so on. All this appears by a glance at the original bill of exceptions.

This indebtedness consisted of (fols. 628, 629):

1. Notes.....	$57,697.37
2. Cheques not charged.....	75,616.25
	$133,313.62

and the balance, mostly by the crediting to Collins' private deposit account in the bank of moneys borrowed by the bank elsewhere, and *its* property, not *his*, under circumstances similar to those now to be narrated.

On the 12th of October, 1891, Collins, in New York, borrowed for the California National Bank of the Western National Bank, on paper of the

California Bank, $20,000, and that amount was placed to the credit of the California National Bank in its deposit account in the Western National, and was afterwards chequed out by the California Bank (fols. 226–229, 645–648). On the 13th of October, O'Brien made out a deposit slip to credit Collins $20,000, stating on the slip to be "Western Nat." (fols. 169, 606), the slip being in O'Brien's handwriting (fol. 169). From this deposit slip, or "tag," as he called it, the bookkeeper posted into the ledger to Collins' credit in the latter's individual account the same amount of $20,000 (fols. 171, 155, 834), the ledger itself containing the words "W'stn Natl." opposite the credit of $20,000 (fols. 834, 155). A telegram in cipher had previously on that day passed from Collins in New York to O'Brien in San Diego, which the court, on the objection of the defendant, ruled out (fols. 497–8).

On the 12th and 13th days of October Collins, in New York, borrowed for the California National Bank of the United States National Bank in New York, first, $7,595.27, on two rediscounted bills, which the California National Bank had discounted; and, secondly, $17,316.25 on the note of the California National with six of the latter's discounted bills as collateral. The total proceeds, $24,911.52, were placed to the credit of the California National in its deposit account in the United States National, and were afterwards chequed out by the former (fols. 237–241, 669). On the 13th of October, O'Brien made out a deposit slip to the credit of Collins for $24,500, writing on it "U. S. Nat., N. Y.," and on the 14th another for $500, writing on that, "more U. S. Nat.," and those

amounts were posted to Collins' credit in the latter's individual account in the California Bank, there being written right out in the ledger opposite the larger of the two items the words, "U. S. Nat., N. Y.," and both deposit slips being in O'Brien's handwriting (fols. 605, 607, 155, 166–171, 834). There were telegrams in cipher referring to each of these from Collins to O'Brien on those days, which were ruled out by the Court on the objection of the defendant (fol. 497).

The above were the "acts of fraud or dishonesty" on the part of O'Brien which the court submitted to the jury. The plaintiff's claim was that O'Brien had deliberately put forty-five thousand dollars of the bank's money to Collins' credit, falsely writing upon the deposit slips that the money had come to Collins from the two New York banks.

As bearing upon O'Brien's knowledge, the plaintiff put in the general ledger (fol. 208, not printed) which showed the credits of the same amounts at the same times to the California Bank in its accounts with the two New York banks, and also evidence of the following transactions:

On the second of May, 1891, forty thousand dollars were put to Collins' credit by simply making an "item"—that is, putting a piece of paper in the cash (fols. 216, 499–505). The deposit slip in this instance is in the handwriting of Harry E. O'Brien (fol. 216), the brother of the cashier; a clerk in the bank and, of course, subject to the cashier's orders.

On the twenty-fifth of May, 1891, O'Brien made out to Collins three certificates of deposit—one for $10,000 and two for $7,500 each (fols. 675–679),

and took Collins' cheque therefor (fol. 625), which cheque he did not charge to Collins' account (fols. 181–3). Collins used these certificates as collateral to effect a loan to the same amount, $25,000, from one Wood in Denver (fols. 244–252). The draft in which the proceeds were given to him he used in the Denver National Bank; $5,115.25 of it to pay a debt of his own, and the balance of $19,883.75 he put to the credit of the California National there (fols. 255–6). The above cheque (Exhibit Q) stands therefore for an indebtedness of $5,115.25 only.

On the sixth of June, 1891, O'Brien put to the credit of Collins in the California National $20,000, writing on the deposit slip, "By Teleg., Nat. Park Bk." (fol. 633), and this amount was posted to the credit of Collins in his individual account in the ledger (fols. 829, 216). On the third of June Collins had effected a loan of that amount from the Park Bank to the California National upon a note of the latter bank (fol. 637), the proceeds of which had been placed to the credit of the bank in the Park Bank (fols. 222–4), and the California Bank drew out the money.

On the twentieth of July, 1891, O'Brien gave Collins a certificate of deposit for $20,000 and took Collins' cheque therefor, which he never charged up against the latter (fols. 626, 185).

On the sixteenth of September, 1891, he gave Collins a certificate of deposit for $15,000 and took Collins' cheque therefor, which he never charged up against the latter (fols. 627, 185).

On the twenty-second of September, 1891, he gave Collins two certificates of deposit for $7,500 and $8,500, for which Collins gave his cheque,

which was never charged up against him (fols. 622–4, 180, 616–21).

Here were on the morning of the twelfth of October sixty thousand dollars of false deposits and seventy-six thousand dollars of certificates of deposit, issued for nothing:

23 May	$10,000
" "	7,500
" "	7,500
20 July	20,000
16 Sept	15,000
22 Sept	7,500
" "	8,500
	$76,000

which we know of.

Here is a deliberate giving to Collins of one hundred and thirty-six thousand dollars of the bank's money, embracing nine false transactions, all but one of which were done by O'Brien himself.

And it may be, that had the other deposit slips used upon the trial (Exhibit Y, fol. 634) been printed, other false deposits would appear.

No denial was made. O'Brien was called by the plaintiff, but declined to testify on the ground that it might tend to criminate himself; the defendant's counsel being present and assisting (fols. 140, 142).

In addition to the above there are the transactions of the thirteenth and fourteenth October—$45,000—on which the court sent us to the jury, and on the 31st October O'Brien put to Collins' credit $20,000, writing on the deposit

"Check 1st Chic	$10,000
" West Nat	10,000
	20,000 "

(fol. 608), and charged those two banks correspond-

ing amounts (fol. 319); this was purely imaginary (fols. 227, 272).

Collins drew out all of this money—the balance to his credit in his deposit account being on the eleventh November, when the bank closed, $10,420.90 (fol. 835).

There is no doubt about this proof. Mr. Pauly, as early as the eighteenth of July, 1892, sent to the plaintiff in error a detailed account showing that Collins owed the bank when it closed $374,978.22 in his own name (fols. 709, 723), and claiming also that under the name of Dare and Collins he further owed the bank $348,703.52 (fol. 709). The expert Bloodgood swore to the fact (fol. 313). The plaintiff in error sent an expert accountant to San Diego in July, 1893, and August, 1894 (fol. 509). He was given full access to all the books (fol. 509). They put him upon the stand and he did not question one word of the foregoing (fol. 510.)

II.—*As to the Discovery, Notice and Claim.*

The assets of the bank were taken possession of by the bank examiner on the thirteenth of November, 1891. Mr. Pauly took possession as receiver on the twenty-ninth of December, 1891 (fol. 411). O'Brien continued right along at the bank (fol. 411) until the first of March, 1892, when, on applying to Mr. Pauly for his salary for that month, he was told that it would be kept to be applied upon his (O'Brien's) indebtedness to the bank (fols. 311–312).

O'Brien's deposit account was overdrawn.

O'Brien thereupon left.

The receiver notified the plaintiff of acts of fraud

and dishonesty on the part of O'Brien on the twenty-third of May, 1892.

Mr. Pauly says that his discovery was made by the report to him of an expert by the name of Sparks. Sparks was employed by him on the first of April, 1892—not before—(fols. 285–6), and continued until the first of June.

Mr. Bloodgood assisted him (fols. 285–6).

Some days before the twenty-third of May they discovered the acts of O'Brien of the thirteenth and fourteenth of October, as already given, and made a written report about them to Mr. Pauly (fols. 285–8).

He thereupon on the twenty-third of May wrote to the plaintiff in error that "a discovery of fraud "had been made of a sufficient amount to require "the payment of the" amount of the bond, and asking for a blank to prepare the claim (fol. 689). To this the plaintiff in error responded by the letter which is printed at folio 691—sending the blank. This letter was received by Mr. Pauly about the eighth or ninth of June. On the twenty-fourth of June Mr. Pauly sent the letter printed at folio 695, enclosing the claim (fol. 596), and the notice (fol. 698). This was received by the plaintiff in error, and on the eighth of July it wrote to Mr. Pauly, acknowledging its receipt, not objecting to the proof of claim at all, but asking for full information as to the shortages and credits of both Collins and O'Brien (fol. 706). To this, on the eighteenth July, Mr. Pauly responded, by sending the Collins account, given at folios 733–819 (fol. 708). Correspondence followed between the parties, continuing until the fourth of October (fols. 708–732), mainly relating to the going of an expert, whom the Surety

Company intended to send to examine into the matters, and giving excuses why his going had been delayed. He had to go elsewhere upon its other matters, and had not got there as late as the fourth of October.

Mr. Pauly is uncertain in his memory as to the time of his discovery, and will not say but what it may have been as early as March or February, or even January, but to this one thing he always sticks—that the discovery was made by him, by its being communicated to him by the expert Sparks (fols. 404, 405, 417, 453, 484).

Now, we know that he did not employ Sparks until the first of April, and that Sparks was in his employ until the first of June (fols. 285–6). The payments to Sparks show this beyond question. We also know that the report of Sparks, in which Bloodgood joined, was not made to Mr. Pauly until a very few days before the twenty-third of May (fols. 285–8).

III.—*As to Collins' certificate to O'Brien's honesty.*

The defendant put in evidence the following paper, made before the policy was given (fol. 948):

"EMPLOYER'S CERTIFICATE.

"I have read the foregoing declarations and "answers made by George N. O'Brien and believe "them to be true.

"He has been in the employ of this Bank dur- "ing three (3) years; and to the best of my knowl- "edge has always performed his duties in a faith- "ful and satisfactory manner.

" His accounts were last examined on the 28th " day of March, 1891, and found correct in every " respect. He is not to my knowledge, at present, " in arrears or in default.

" I know nothing of his habits or antecedents " affecting his title to general confidence, or why " the bond he applies for should not be granted to " him.

" Amount required $15,000.00. Bond to date " from July 1, 1891.

" Dated at San Diego, the 10th day of July, 1891.

" J. W. COLLINS,

" Pt. Cal. Nat. Bk.,

" On behalf of....."

At the close of the evidence it made a motion for the direction of a verdict in the following words (fol. 513):

" Defendant's counsel moves to dismiss the com- " plaint, or for the direction of a verdict * * * " upon the ground of misrepresentation in the " application for this bond—misrepresentation by " Mr. O'Brien and by Mr. Collins, and misrepre- " sentation by the bank itself acting through Mr. " Collins."

It also made to the court the following requests to charge (fols. 533–535):

" 33d. If the jury find upon the evidence that " Collins acted for the bank in procuring the bond " sued on, and that before procuring this bond he " had been guilty of dishonest and fraudulent " conduct in connection with his duties as presi- " dent, and that this fact was known to O'Brien, " but was concealed from the surety company, " then there can be no recovery in this action.

"34th. If the jury find that at the time of "making application for or receiving the bond "in suit any person acting for the bank repre- "sented to the surety company that the accounts "of the cashier O'Brien had been examined, and "had been found to be correct, and the surety "company relied upon such representations when "in truth those accounts showed that prior to this "time Collins had been guilty of dishonest and "fraudulent conduct in his connection with his "duties as president of the bank, then there can "be no recovery in this action.

"35th. If the jury find that at the time of mak- "ing application for the bond in suit any person "acting for the bank falsely and fraudulently, "and with knowledge to the contrary, represented "to the surety company that the accounts of the "cashier O'Brien had been examined and had "been bound to be correct, when in truth those "accounts showed that prior to this time Collins "had been guilty of dishonest and fraudulent con- "duct in connection with his duties as president "of the bank, then there can be no recovery in "this action.

"36th. If the jury find upon the evidence that "the bond in suit was procured by concealment or "misrepresentation of any facts showing prior dis- "honest or fraudulent conduct on the part of "O'Brien, then the plaintiff cannot recover, no "matter who was guilty of such concealment or "misrepresentation. The bank cannot now en- "force the bond without being affected by the con- "sequences of such concealment or misrepresenta- "tion."

The court, upon this matter, made the following charge:

(Fols. 566–8.) "A defense has been interposed to which I must call your attention. It is said that this bond of indemnity was obtained upon an application which was certified to by the bank itself, and that in the application facts were misrepresented and facts were concealed—with fraudulent intent on the part of the bank; therefore that the bond is void. The application was accompanied by a certificate of Collins, the president of the bank. The only knowledge of any facts which ought to have been communicated, or were misrepresented, the only knowledge which the bank possessed at the time that application was made was the knowledge of Collins himself. Ordinarily a corporation, like any other principal, is chargeable with the knowledge of any facts which are known to its agents; but in this case all these transactions, if there were any transactions of a fraudulent and dishonest character on the part of the cashier, were transactions for the benefit of Collins, and he was a participator in the fraud, and under those circumstances the law does not infer that the agent or the officer will communicate the fact to his principal, the corporation, and under such circumstances the corporation is not bound by his knowledge. So this defense melts away and there is nothing of it whatever."

And to this the defendant took the following exceptions.

(Fol. 581.) "Mr. Strong: And lastly, your Honor's instructions, that because Mr. Collins was the offender, if there were any offender, therefore his knowledge did not bind the bank.

"The Court: You are entitled to an exception."

(Fol. 584.) "The defendant's requests are de-
" nied, except as covered by the charge.
" Mr. Strong: The defendant excepts separately to each one."

The following points are in the order of those made in the brief which the plaintiff in error used in the court below, and are an attempt to answer that brief.

BRIEF OF THE ARGUMENT.

I.

The motion for the non-suit was properly denied.

The contrary of this proposition, as contained in the brief which the plaintiff in error used in the court below embraced three distinct matters:

1. That Mr. Pauly did not give notice of the acts of O'Brien soon enough after the discovery of them.

2. That he did not make his claim soon enough after that discovery.

3. That he did not make the discovery within six months after O'Brien's " retirement " from his employment.

The first two matters will be considered together, since the notice and the claim were given and made together—1 and 2. The provision in the con-

tract is in these words (fol. 33): "That the Com-
" pany shall be notified in writing, at its office in
" the City of New York, of any act on the part
" of the Employee, which may involve a loss for
" which the Company is responsible hereunder, *as*
" *soon as practicable* after the occurrence of such
" act shall have come to the *knowledge* of the Em-
" ployer. That any claim made in respect of this
" bond shall be in writing, addressed to the Com-
" pany, as aforesaid, *as soon as practicable* after
" *the discovery of any loss* for which the Company
" is responsible hereunder."

What is "as soon as practicable" is a question of fact.

Angell, §§ 231, 233.
Insurance Co. *vs.* Stark, 6 Cranch, 273.
Cashau *vs.* N. W. Nat. Ins. Co., 5 Biss., 476.
O'Brien *vs.* Phœnix Ins. Co., 76 N. Y., 459.
Carpenter *vs.* G. A. Ins. Co., 135 N. Y., 389.
McNally *vs.* P. Ins. Co., 137 N. Y., 389.
Edwards *vs.* Baltimore Fire Ins. Co., 3 Gill, 176, 188.
People's Accident Assn. *vs.* Smith, 126 Penn. St., 317, 325.

In *Cashau* vs. *Northwestern Nat. Ins. Co.*, 5 Biss., 476, the contract was of reinsurance, and contained the following: "All persons having a
" claim under this policy shall proceed at once to
" put the property in the best order, and give im-
" mediate notice, and render a particular account

"thereof in writing, under oath, stating the time, "origin and circumstances of the fire."

The fire occurred 9th October, 1871. The insuring company was made insolvent by the fire and a receiver was appointed and qualified 16th October, 1871. Proofs of loss were made by insured and served on the receiver 8th December, 1871.

On the 29th December, 1871, the receiver gave notice to the defendant that proofs of loss had been served upon him by the insured, and that he would hold the defendant liable. This was served on the president of defendant 29th December, 1871, and acknowledged by the secretary 4th January, 1872. On the 22d January, 1872, proofs of loss were served by the receiver on the defendant.

In a suit by an assignee of the receiver, the court directed a verdict for plaintiff. On a motion for a new trial Mr. justice *Miller* refused to disturb the verdict, saying: "The word *immediate* "must mean a reasonable time under the circum- "stances." (p. 478).

It thus appears that the fire occurred on the ninth of October, 1871, and no notice of any kind was given to the insurance company until the twenty-ninth of December—a period of two months and twenty days. There was no excuse, except that the receiver was new to the business. That excuse can be urged here with equal force.

In *O'Brien* vs. *Phœnix Insurance Co.*, 76 N. Y., 459, the loss occurred the eighth of March, and the proofs were furnished the sixteenth of May—two months and eight days.

In *Carpenter* vs. *G. A. Ins. Co.*, 135 N. Y., 298, the lapse of time was one hundred and fifteen days.

In *NcNally* vs. *P. Ins. Co.*, 137 N. Y., 389, the policy provided that a certain certificate should be given "if required." The fire occurred seventh June, 1885. The certificate was "required" on the seventeenth of June, 1885. It was furnished seventh of June, 1886—ten days less than one year and the court did not disturb the verdict of the jury.

In *Brink* vs. *Hanover Fire Ins. Co.*, 80 N. Y., 108, the court held the following question to be proper: "Q. So far as you could individually did "you get those proofs of loss forwarded as soon as "it was possible for you to de so?" In that case the policy required the proofs to be forwarded as "soon as possible." The fire occurred on the twenty-third of November. The proofs were prepared by one of the plaintiffs and forwarded to the other on the seventh of the following January, and they were given by the latter to the insurance company on the seventh of February.

Evidence was as follows:

The bank examiner took possession of the assets of the bank on the twelfth of November, 1891, and Mr. Pauly qualified as receiver on the twenty-ninth of December, 1891. O'Brien continued right along at the bank until the first of March, 1892, and he then left, not because Mr. Pauly discharged him, but because when he then demanded his salary for the month Mr. Pauly told him that he must retain it to apply upon his (O'Brien's) acknowledged indebtedness to the bank. O'Brien then left. Here is evidence that Mr Pauly knew nothing to the discredit of O'Brien as late as the first of March (fols. 411, 312–13).

Mr. Pauly testifies that he first acquired his knowledge of the acts of O'Brien which are in question, by being informed by the expert Sparks (fols. 404–5, 417, 453, 597–8). Sparks was first employed by Mr. Pauly on the first of April, 1892, and continued until the last of May (fols. 285–6). He was assisted by Bloodgood (fols. 285–6, 453). They "worked all the time constantly and worked hard" (fol. 286). They prepared a paper which described these acts and gave it to Mr. Pauly shortly before the twenty-third of May (fols. 287–8), and Mr. Pauly notified the defendant on the twenty-third of May.

Fol. 690, date of letter not printed, but stated in the answer to it (fol. 691) to be 23d May.

Bloodgood testifies that he had no idea that O'Brien had been guilty of any dishonesty or fraud until they found it out in May (fols. 355, 353, 357), and that they then first discovered the deposit tags made by O'Brien (fol. 287).

On this we claimed that the discovery by Mr. Pauly was made by him by means of this discovery of the experts and their written report to him (fols. 285–288).

Now, no matter how much evidence there may have been to the contrary of this, we had a right to go to the jury upon the difference in the testimony and the verdict has settled that issue in our favor.

Nor is the evidence to the contrary of any force—it is this. At the outset the bill of particulars was mistakenly made to state the discovery as of January and February, and, as the rules require, Mr. Pauly verified it. At the beginning of the trial this was amended. Still the defendant put it in evidence as the declaration of Mr. Pauly, and it is

much the strongest bit of evidence which it has got.

Then there are several statements by Mr. Pauly on cross-examination before trial. Not positive—but that *it may have been* as early as January or February. He will not say but what he knew of the acts for as much as two months before he notified the defendant, and such like. It is nothing stronger than saying that he does not remember. But in the same breath he always says that the way he made the discovery was by information from the expert Sparks—the result of the examination made by the latter.

Now, we know when and for how long Sparks was employed. Not from the uncertain recollections of human witnesses, but from the certain records of *when and for what time he was paid.* His employment was during the months of April and May.

Much stress is laid in the brief upon the facts that the Western National's claim was made to Mr. Pauly as early as the fifth of March, and that as early as the last of January Mr. Pauly made a report to the comptroller of the currency, in which he set out the notes given on the thirteenth October to the Western National and the United States National as outstanding liabilities of the California National. It is difficult to see what this has to do with the matter. The transactions between the California and the other two banks were perfectly honest ones; the former borrowed money, got it, and gave its notes for it, and the notes thus given became valid liabilities. Knowledge of these transactions does not imply knowledge that on the following day O'Brien put to the credit of Collins a

sum of money which did not belong to the latter. The only evidence of this which we now have, or which anybody ever did have, is the deposit tag. Without this it would simply appear that Collins deposited so much money on the thirteenth of October; *non constat* but it may have been gold. Here, so far, is no evidence nor suspicion of anything wrong. But the deposit tag shows that this deposit was not gold, but money in the two New York banks, and the transactions with the New York banks show that that money belonged to the bank and not to Collins. And this is the only relevancy of the transactions in New York. *They show that the statement on the deposit tag—which was made the basis of the credit—was false.*

The deposit tag is in O'Brien's handwriting, *and is the only bit of evidence which anybody ever had of O'Brien's complicity in these transactions.*

Now, the evidence is that the deposit tag was not found until May (fol. 287).

The statement in the brief which the plaintiff in error used below that a complaint was sworn out against O'Brien in February is a mistaken one. Mr. Pauly never gave any such testimony. He said a complaint was then sworn out against *Collins*, not *O'Brien* (fols. 422–3). Further he said that the complaint against O'Brien was made to *the Grand Jury* (fol. 423), and the Grand Jury did not sit until June (fol. 355).

The verdict of the jury has thus established the fact that the discovery was made by Mr. Pauly in May, and shortly before the twenty-third of May.

On the twenty-third of May Mr. Pauly wrote the letter which is printed at folio 690, informing the defendant that he has made a discovery of

fraud sufficient to require the payment of both the O'Brien and the Collins bonds, and asking for blanks to make the claims. To this the defendant replied on the thirty-first of May, sending the blanks (fol. 691). On the twenty fourth of June Mr. Pauly sent the claim (fol. 596). This was received without any objection, and a correspondence ensued, which continued until October, and which on the part of the plaintiff in error consisted mostly of requests for further information, which was furnished as asked, and requests that Mr. Pauly should wait until their Mr. Bradbury Williams got there (see the correspondence, fols. 690–732).

Whether all this was "as soon as practicable" after the discovery of the loss was, as above shown, a question of fact, and the jury has determined it in our favor.

3. That the discovery was not made within six months after the "retirement" of O'Brien.

This is on the supposition that the "retirement" of O'Brien took place when the bank examiner took possession of the assets on the twelfth of November, 1891, and that the "discovery" did not take place until after the twelfth of May, 1892.

Neither supposition is correct. *The retirement.* The statement in the brief that the receiver had sworn that O'Brien ceased to act as cashier on the twelfth of November is incorrect. What Mr. Pauly swore to was that he dispossessed the officers and employees, but continued O'Brien "for a short time" (fol. 411). Now it is certain that this short time continued until the first of March, when O'Brien left of his own accord (fols. 312–13).

These are the facts. What is the legal consequence?

In the first place it is perfectly well settled that the appointment of a receiver neither dissolves a corporation nor puts an end to the terms of its officers.

Kincaid vs. *Dwinelle*, 59 N. Y., 548.

Suppose in this case the comptroller of the currency had restored the assets to the bank, as he actually intended and tried to do, would not O'Brien still have been cashier? He therefore continued to be cashier and acting until the first of March.

But *secondly*, the testimony relied on in the brief is that *Mr. Pauly*, not the bank examiner, dispossessed the officers (fol. 410). But Mr. Pauly did not take possession until 29 December (fol. 411). The 23d of May is thus within the six months.

And *in the next place*, let us suppose O'Brien ceased to be cashier on the twelfth of November. He still continued to be an employee of some kind and in some sort of capacity, But the bond is not limited to the time when he was cashier. It insures against his acts "in connection with the duties of "the office or position hereinbefore referred to" (cashier) "*or the duties to which in the employer's* "*service he may be subsequently appointed*" (fol. 30), and the "retirement" is not from his office of cashier, but it is the "retirement of the employee "*from the service of the employer*" (fol. 30).

The Discovery: Let us now suppose that the "retirement" did occur on the twelfth of November, and see how the case stands.

The testimony as to the discovery is that it was

made by the experts and communicated to Mr. Pauly "some time in May" (fol. 287)—"towards "the end of May" (fol. 287). "It must have "been prior to the 23d of May" (fol. 288). "We "began the examination about the first of April, "1892, and completed it somewheres towards the "end of May. We worked all the time constantly "and worked hard" (fols. 285–6).

From this evidence the jury could find any day in May—the eleventh, for instance—as the date of the discovery, and if it be necessary to sustain the verdict, it has done so.

4. "It did not appear that the cashier had been "guilty of any fraud or dishonesty."

The cashier, having received from Collins a telegram, the contents of which we do not know, put $20,000 to Collins' credit, and in doing so made out a deposit ticket in which he impliedly said that Collins had got the money from the Western National Bank. The statement was false. *If* he knew it to be false, the act was fraud. Upon the issue of his knowledge we proved:

1. That Collins then owed the bank three hundred thousand dollars.

2. That the cashier, at the time, had the money charged to the Western National in the general ledger (fol. 208), but no credit made to any account. This should not have been the entry had the money been Collins' (fol. 318).

3. It appears by the printed evidence that he had done the same thing twice before. *How*

many other instances would appear had the plaintiff in error printed the parcel of deposit slips which is in the bill of exceptions (fol. 634) does not appear. In their absence, it is submitted that the Court will not disturb the verdict on this ground, even though it should think the printed evidence not sufficient.

Then there is the absence of all denial on the part of O'Brien and his refusal to testify on the ground that it would tend to criminate him (fol. 140).

It is submitted that there was enough to go to the jury upon the question of his knowledge and intent, and the jury has found that his intent was fraudulent.

5. *No actual loss was shown as to any loss alleged in the proof.*

The theory of this is that the policy requires the claim to state "a loss," and that the claim in this instance does not set forth any loss.

The claim states that O'Brien put to the credit of Collins the sum of forty-five thousand dollars "without the said Collins paying any considera-"tion therefor to said bank, and without being en-"titled to said credits, as he, the said O'Brien, "then and there well knew" (fol. 600). "That "neither of the above sums, nor any part thereof, "*have ever been returned or repaid to said bank*" (fol. 602).

The loss occurred when the money was taken from the credit of the bank and was put to the credit of Collins, and none of it was ever returned. And here is sufficient statement of a loss of forty-

five thousand dollars. But another paper accompanied this, in which the statement of the putting of the forty-five thousand dollars to the credit of O'Brien having been given in the same words, the paper proceeds: "That in pursuance of a certain "bond, numbered 85,565, heretofore issued by "your company, in which you agree to make good "and reimburse the said California National Bank "of San Diego all and any pecuniary loss sus- "tained during the continuance of the bond on "account of the fraud or dishonesty of the said "G. N. O'Brien, after a written statement of said "loss is presented."

"This notice is given you as soon as practicable "after the occurrence of the wrongful acts herein- "before referred to, and demand is hereby made "upon you by the undersigned, as representative "of said bank and as such Receiver, for the sum of "fifteen thousand dollars ($15,000), the amount in "said bond stipulated" (fols. 703–704). It further refers to the other paper, and calls it "a statement of a loss."

This paper would be good as a pleading; it sufficiently apprising the Surety Company that Mr. Pauly wanted fifteen thousand dollars, because of loss occasioned by O'Brien having put forty-five thousand dollars of the bank's money to the credit of Collins. Nobody in the world could possibly understand it in any other way.

But an entirely sufficient answer is that the company *retained* the proof of claim *without any objection*, all through a long correspondence, extending from the twenty-fourth of June, 1892, until the fourth of October, 1892, and consisting of six letters on the part of Mr. Pauly and five on

the part of the defendant (fols. 694-732). The substance of these is as follows:

On the eighth of July the defendant writes (fol. 706): "We are in receipt of your two letters of "the 24th ultimo, transmitting two affidavits rela- "tive to the claim under the bonds of this com- "pany to the California National Bank for J. W. "Collins and George N. O'Brien, in the respective "positions of president and cashier of said bank. "We have respectfully to request that you will "make a statement of each on the claim forms "which we use for that purpose, two of which are "herewith enclosed."

Under date of the twenty-sixth of July, the de- "fendant writes (fol. 716): "Yesterday afternoon "we received your communication of the 18th "instant, and its enclosures, *making formal claim* "against this Company under bonds of the late "J. W. Collins and G. N. O'Brien, formerly the "President and Cashier respectively of the Cali- "fornia National Bank, and for information in re- "gard to the whole case we have referred copies "of documents to our Inspector, Mr. Bradbury "Williams, for investigation and report. You do "not transmit to us a copy of your letter of the "20th June, addressed to Mr. George N. O'Brien, "to which he replied on June 24th last as per "copy transmitted by you.

"*Inquiry into this matter* cannot necessarily be "completed for some time by reason of the pecul- "iar situation of affairs, and also because of the "enforced absence of Mr. Williams on other mat- "ters, which will delay him for some two weeks "or more. Please give Mr. Williams all the in- "formation he desires, in order that full advices

" may be transmitted to this Company at the earli-
" est practicable date, so that we may pass intelli-
" gently on the claim in question."

In his answer Mr. Pauly sent the letter to O'Brien (fol. 720), the receipt of which the defendant acknowledges (fol. 721).

The rest of the correspondence mainly relates to explaining the delay of Mr. Bradbury Williams, who had not got to San Diego on the fourth of October—some ten weeks—and in fact never did get there at all.

The criticism with which we are now concerned was first raised upon the trial *more than two years later*.

It is not even in the answer.

From all this the jury could have found a waiver of this defect, if it be a defect, and, of course, has done so.

> *Home Ins. Co.* v. *Baltimore Warehouse Co.*, 93 U. S., 527, 546.
>
> *People Fire Ins. Co.* v. *Pulver*, 127 Ill., 246, 249.

and the cases collected by Mr. May, Insurance, 3d ed., Section 469 B.

II.

The motion to dismiss the complaint or direct a verdict for the defendant was properly denied.

The converse of this proposition, in the brief which the plaintiff in error used below is based

upon the certificate as to O'Brien's character, signed by Collins, and supposed to have been given to the Surety Company at the time it issued the policy. It is claimed that this certificate made false statements as to O'Brien's character and conduct, and that the Surety Company issued its policy in reliance upon the truth of those statements.

That certificate reads as follows:

"EMPLOYER'S CERTIFICATE.

"I have read the foregoing declarations and "answers made by George N. O'Brien and believe "them to be true.

"He has been in the employ of this Bank dur- "ing three (3) years; and to the best of my "knowledge has always performed his duties in a "faithful and satisfactory manner.

"His accounts were last examined on the 28th "day of March, 1891, and found correct in every "respect. He is not to my knowledge, at present, "in arrears or in default.

"I know nothing of his habits or antecedents "affecting his title to general confidence, or why "the bond he applies for should not be granted to "him.

"Amount required $15,000.00. Bond to date "from July 1, 1891.

"Dated at San Diego, the 10th day of July, 1891.

"J. W. COLLINS,

"Pt. Cal. Nat. Bk.,

"On behalf of....."

The motion for the direction of a verdict was properly denied, for several reasons.

1. The liability of a principal for the *acts* of his

agent is confined of course to those cases where the acts are within the scope of the agent's authority.

Western National Bank *v.* Armstrong, 152 U. S., 346.

United States *v.* City Bank of Columbus, 21 How., 356.

And, as a detail of this, the liability of an innocent principal for the *frauds and deceit* of his agent is restricted to cases where the agent was acting within the scope of his authority.

Story on Agency, § 456.

To make representations as to the honesty of human beings is not within the scope of the authority of the president of a national bank.

Western National Bank *v.* Armstrong, 152 U. S., 346.

The Court, speaking by Mr. justice Shiras, said: (P. 350.) "There is no evidence whatever that "the board of directors of the Fidelity National "Bank gave any authority to Harper to borrow "money on behalf of the bank, much less to bor- "row so enormous a sum on so long a time. In "this respect the complainant's case stands barely "on the assertion in the bill that 'Harper was the "'vice-president and general manager of the Fidel- "'ity National Bank, with full authority to make "'said loan on its behalf.' The only evidence we "find in the record to support such averment is "found in the answer by J. Harvey Waters, the "general book-keeper of the Fidelity National "Bank, on cross-examination, wherein he stated "that E. L. Harper was the vice-president and

"managing officer, and that by 'managing officer' "he meant that Harper was the 'general manager "'of the business of the bank.' No such office "as that of 'general manager' is known or named "in the National Bank Acts, nor does any such "office exist by usage. The most that can be "claimed in this case is that Harper acted as the "principal executive officer of the bank. It cannot "be pretended that, as such, he had power, without "authority from the board, to bind the bank by "borrowing $200,000 at four months' time.

"It might even be questioned whether such a "transaction would be within the power of the "board of directors. The powers expressly granted "are stated in the eighth section of the National "Bank Act (Rev. Stat., § 5136, par. 7): A national "bank can 'exercise by its board of directors, or "'duly authorized officers or agents, subject to "'law, all such incidental powers as shall be "'necessary to carry on the business of banking, "'by discounting and negotiating promissory "'notes, drafts, bills of exchange, and other evi-"'dences of debt; by receiving deposits; by buy-"'ing and selling exchange, coin and bullion; by "'loaning money on personal security; and by "'obtaining, issuing, and circulating notes.'

"The power to borrow money or to give notes is "not expressly given by the act. The business of "the bank is to lend, not to borrow, money; to "discount the notes of others, not to get its own "notes discounted. Still, as was said by this "Court, in the case of *First Nat. Bank* v. *Nat.* "*Exchange Bank*, 92 U. S. 122, 127: 'Authority "'is thus given in the act to transact such a bank-"'ing business as is specified, and all incidental

" 'powers necessary to carry it on are granted. " 'These powers are such as are required to meet " 'all the legitimate demands of the authorised " 'business, and to enable a bank to conduct its " 'affairs, within the general scope of its charter, " 'safely and prudently. This necessarily implies " 'the right of a bank to incur liabilities in the " 'regular course of its business, as well as to be- " 'come the creditor of others.'

"Nor do we doubt that a bank, in certain cir- "cumstances, may become a temporary borrower "of money. Yet such transactions would be so "much out of the course of ordinary and legitimate "banking as to require those making the loan to "see to it that the officer or agent acting for the "bank had special authority to borrow money.

"Even, therefore, if it be conceded that it was "within the power of the board of directors of "the Fidelity National Bank to borrow $200,000 "on time, it is yet obvious that the vice-president, "however general his powers, could not exercise "such a power unless specially authorised so to "do, and it is equally obvious that persons dealing "with the bank are presumed to know the extent "of the general powers of the officers.

"Without pursuing this part of the subject fur- "ther, we think it evident that Harper had no "authority to borrow this money, and that the "bank cannot be held for his engagements, even if "made in behalf of the bank, unless ratification "on the part of the bank be shown."

In United States *v.* City Bank of Columbus, 21 How., 356, Moodie, the cashier of the defendant, had signed, as cashier, a writing to the secretary of treasury in regard to one Miner, which contained

these words, "He is also authorised, if consistent "with the rules of the Treasury Department, to "contract, on behalf of this institution, for the "transfer of money from the East to the South or "West, for the Government" (p. 360).

Under this authority Miner made, on the part of the bank, with the secretary of the treasury, a contract to transfer one hundred thousand dollars to New Orleans and the money never got there.

On a suit against the bank the trial court charged the jury as follows (p. 363):

"That if they should find that the letter written "by Moodie was his own act, and had been given "without the knowledge or authority of the board "of directors, or of any of them individually, ex-"cept Miner, and that the agency of Miner was "not constituted by or known to the board of "directors, or the directors individually, or any of "them, except Miner, but was the act of the cashier "alone; and if they should find that Moodie had "no power as cashier, except such as belonged to "the office of cashier generally, or such as are "given by the charter or by the by-laws or other "law or usage of the said bank, that the defend-"ant was not concluded by that letter, and is not "bound by the contract made by Miner, without "some subsequent ratification of the same, though "the Secretary had, in contracting with Miner, "relied upon it as as the act of the bank."

The Court, speaking by Mr. justice Wayne, said (p. 363):

"It"—the above charge—"is all that the liti-"gants could have expected, and is liberal to "both. It is also in coincidence with the views "generally entertained of the powers and duties

"of the cashiers of banks, and perfectly so with "such as have been expressed by this court in "previous reported cases. In Fleckner *v.* The Bank "of the United States (8 Wheat., 338, 356, 357,) "this court said, the charter authorises the presi- "dent and directors to appoint a cashier and other "officers of the bank, and gives the president and "directors, or a majority of them, full power and "authority to make all such rules and regulations "for the government of the affairs and conducting "the business of said bank as shall not be con- "trary to the act of incorporation. It contains "no regulations as to the duties of cashiers; "with the directors it would rest to fix the "duties of cashier or other officers, whether they "have made any regulation upon this subject "does not appear; but the acts of the cashier, "done in the ordinary course of the business, act- "ually confided to such an officer, may well be "deemed *prima facie* evidence that they fell "within the scope of his duty. In the case Bank "of the United States *v.* Dunn (6 Peters, 51,) the "court would not permit the president and cashier "of the bank to bind it by their agreement with the "endorser of a promissory note, that he should not "be liable on his endorsement. It said it is not the "duty of the cashier and president to make such "contracts, nor have they power to bind the bank, "except in discharge of their ordinary duties. All "discounts are made under the authority of the "directors, and it is for them to fix any conditions "which they may think proper in loaning money. "The court defines the cashier of the bank to be "an executive officer, by whom its debts are re- "ceived and paid, and its securities taken and

"transferred, and that his acts, to be binding upon "a bank, must be done within the ordinary course "of his duties. His ordinary duties are to keep "all the funds of the bank, its notes, bills, and "other choses in action, to be used from time to "time for the ordinary and extraordinary exigen- "cies of the bank. He usually receives directly, "or through the subordinate officers of the bank, "all moneys and notes of the bank, delivers up "all discounted notes and other securities when "they have been paid, draws checks to withdraw "the funds of the bank where they have been de- "posited, and, as the executive officer of the "bank, transacts most of its business.

"The term ordinary business, with direct ref- "erence to the duties of cashiers of banks, occurs "frequently in English cases, and in the reports "of the decisions of our State courts, and in no "one of them has it been judicially allowed to com- "prehend a contract made by a cashier without an "express delegation of power from a board of "directors to do so, which involves the payment of "money, unless it be such as has been loaned in "the usual and customary way, nor has it even "been decided that the cashier could purchase or "sell the property, or create an agency of any "kind for a bank which he had been author- "ised to make by those to whom has been con- "fided the power to manage its business, both "ordinary and extraordinary. The case of Kirk "*v.* Bell (12 English and Common Law Reports, "389), and that of Hoyt *v.* Thompson, were very ap- "propriately cited by the counsel of the appellee, "in this connection; and we think the safe rule in "all instances of acts done by the officers of cor-

"porate companies, or by those who have the "management of their business, from which con- "tracts are alleged to have been made, is, to test "that fact by an inquiry into the corporate ability "which has been given to them, and to their sub- "ordinate officers, or which the directors of the "company can confer upon the latter to act for "them. Such was the view of this Court when it "decided, in the case of the Bank of the United "States *v.* Dunn (6 Peters), that a release given by "its president and cashier to the endorser of a "promissory note of his liability upon it, did "not bind the bank, neither nor both having "any authority to make contracts of that kind. "The case before us is one in which a cashier acts "alone, and in which he testifies that he did so "without any consultation with the president or "directors of the company, and of which they had "no information from him of the transaction until "after the failure of Miner to pay the money in "New Orleans. The act under which the City "Bank of Columbus became a corporation does "not, in any part of it, give any power to a "cashier to act independently of the directors. "No specific power is given to the directors to "appoint a cashier. In the general power given to "the directors to appoint officers to do the ordinary "business of the bank, they have an authority to "appoint a cashier, and such an appointment is a "limitation of that officer's executive function in "doing the business of the bank. It cannot be "pretended that the directors, as a whole, or any "one of them, except Miner, consented to the "cashier's designation of Miner for any such pur- "pose as was concluded between them, to induce

"the Secretary to believe that Miner was the agent "of the bank, either to buy stock of the United "States or to enter into contracts for the trans- "mission of money, free of charge, to those posts "where the United States should designate it to "be put. Such a power in the Secretary of the "Treasury is a necessary one for the transaction "of the business of the Government, pervading, "as it does, every part of the country. The exer- "cise of it, however, requires great care and cau- "tion in the selection of agents for such a pur- "pose, and no authority short of the most certain "should be taken to establish the representative "character of any one for a private company or "corporation to enter into such a contract with the "Secretary."

In Morse on Banks and Banking, § 143:

"§ 143. *President's Authority Virtute Officii.*— "The president of the bank is usually, perhaps uni- "versally, a member of the board of directors, "and is customarily chosen by the board from "their own number. Sections 8 and 9 of our "National Banking Act prescribe this method for "all banks organised under it. It is the duty of "the president to preside at meetings of the board "of directors. The amount and nature of the "duties imposed upon him may vary in different "associations according to the usages or the by- "laws of each. But ordinarily *the position is one "of dignity, and of an indefinite general re- "sponsibility, rather than of any accurately "known power.* The president is usually ex- "pected to exercise a more constant, immediate "and personal supervision over the daily affairs of

"the bank than is required from any other direc-
"tor.

"(*a*) Usage or directorial votes may confer upon
"him special functions, and may extend his au-
"thority to correspond with the increase of active
"duties. But the authority inherent in the office
"itself is very small; indeed, it is very difficult to
"say precisely how or wherein it is really much in
"excess of that which can be exercised by any
"other single director. Practically this legal
"principle is not known, or not distinctly recog-
"nised, in very many banks, and frequently presi-
"dents undertake to exercise a very considerable
"control in the daily routine of business. When
"this is done with the knowledge and approba-
"tion, or the tacit sanction, of the board of
"directors, it may be regarded as legalised by the
"principles of ratification or usage. Yet these
"afford an indefinite and dangerous basis on
"which to rest important dealings. A careful col-
"lation of all the adjudicated cases, it must be
"confessed, wears a striking and peculiar aspect,
"which is not very favorable to the assumption of
"any species of executive authority by a bank
"president without direct authorization. With
"scarcely an exception, all the decisions are to the
"effect that the president had no right to perform
"some particular act, which he had undertaken
"probably in perfectly good faith to perform, and
"which had been called in question, and had given
"rise to the litigation in which it was condemned.
"So the reader will notice that in discussing this
"topic we are obliged, in order to keep within the
"bounds of established law, to confine ourselves
"almost wholly to what a president can *not* do.

"(*b*) Indeed, it is a singular fact that the entire "collection of judicial authorities justifies the "enunciation of only one act as falling within the "properly inherent power of the president. This "solitary function is to take charge of the litiga- "tion of the bank. There is no question that "this matter belongs to him by virtue of his office. "He may institute and carry on legal proceedings, "to collect demands or claims of the bank. He "may appear, answer and defend in suits against "the bank. He may retain and employ counsel "on behalf of the bank. Counsel requested by "him to act for the bank will bind it by their ac- "tion in the case, within the ordinary powers of "counsel, by sole authority of their engagement "by him. Nor will it make any difference, though "circumstances render that engagement originally "wrong or improper.* This would be his own "breach of trust towards the bank, committed "within the scope of his authority, dam- "ages for which the bank could only recover "from himself, and which could affect no innocent "outside parties, whether these should be the "counsel employed, or the other litigants in the "cause.

"(*c*) The National Banking Act does not specify "the powers of president or cashier. They are "held, therefore, to have only such powers as are "inherent in such positions by the very nature of

"* § 143. Savings Bank of Cincinnati *v.* Benton, 2 Met. (Ky.), "240; American Ins. Co. *v.* Oakley, 9 Paige, 496; Mumford *v.* "Hawkins, 5 Den., 355; Oakley *v.* Workingmen's Benevolent "Society, 2 Hilt., 487; Alexandria Canal Co. *v.* Swann, 5 How., "83."

" things. All other powers are left to the directors.
" The president is generally, if not always, a mem-
" ber of the board of directors, and it is his duty to
" preside over their meetings. He has inherently
" only one power beyond that of any other director,
" viz., charge of the bank's litigation.*

"(*d*) A bank president may, on sufficient consid-
" eration, contract with the defendant in a judg-
" ment in favor of the bank to enter a *remittitur*.†"

"§ 145. REPRESENTATIONS AND ADMISSIONS OF
" THE PRESIDENT.—Admissions of the president
" affect the bank only when they relate to matters
" within the scope of his agency.‡ The fact of his
" high and responsible position does not operate
" to extend in any degree the rigidity of this rule
" of the common law.

" (*a*) Representations of a president, made in
" transacting the bank's business, are admissible
" against it; but statements in which the bank has
" no interest are not. Like other agents, the presi-
" dent must act within the scope of his authority to
" bind his principal, unless his acts are ratified.§"

II.—To make such a representation is beyond the power of the whole corporation.

The powers of a national bank are confined to the business of banking.

California National Bank *v.* Kennedy,
167 U. S.

"* Hodges, Executor, *v.* First National Bank, 22 Grat., 51."
"† Case *v.* Hawkins, 53 Ala., 702 (1876)."
"‡ Page 145. Spalding *v.* Bank of Susquehanna County, 9 Barr, 28. See remarks on Declarations and Admissions of Cashiers, *post*."
"§ Kennedy *v.* Otoe County National Bank, 7 Neb., 59."

To make representations as to the character of human beings to the end and to the sole end that they may get insurance policies for their own and sole advantage, is not any part of the business of banking.

If, therefore, the board of directors had done it by resolution, it would not have bound the bank.

III.—*The whole matter is a question of fact.*

(*a*) There is no mention in the policy or bond of any application or certificate. The statements in this certificate cannot, therefore, be warranties. The only ground to be taken therefore is that Collins, assuming to act for the bank, perpetrated a fraud upon the plaintiff in error, and that the bank and its receiver cannot keep the policy without adopting the fraud, and this accordingly is exactly the position which the brief of the plaintiff in error in the court below did take.

Now, whether there has been fraud *is always a question of fact.*

McCullar *vs.* McKinley, 99 N. Y., 353, 357.

Warner *vs.* Norton, 20 How., 448, 460.

Wells, Questions of Law and Fact, § 280.

Courts sometimes takes cases from juries because there is not any evidence at all of fraud, of which *McCullar* vs. *McKinley*, 99 N. Y., 353, is an instance, but there is not a case in the books where a court has ever *directed* a verdict *finding fraud*. Even in *Edwards* vs. *Harben* (2 T. R., 587), there had been a verdict for the plaintiff,

which the court simply did not disturb. And all the cases cited in the brief which the plaintiff in error used below, with the exception of two, which are equity cases, and therefore cannot show the distinction, show the same thing. The adjudged cases are often very strict and rigid as to what shall be said in the charge, requiring the court to tell the jury with great distinctness that such and such things are fraud, but they never take the case from the jury.

Even were the doctrine of fraud in law, which was exploded by the Court in *Warner* vs. *Norton*, 20 How., 448, 460, still in force, it would not apply here. In this sort of a case there must be fraud in fact.

Nat. Life Ins. Co. vs. *Minch*, 53 N. Y., 144, 151.

(*b*) But if this be not so—still this case was for the jury, because not only was the evidence of the fraud not certain and conclusive, but it was very slight and inconclusive, if there was any.

There was no certain evidence that any of the statements were false.

As given in the brief used by the plaintiff in error below the statements were as follows:

The whole paper is printed just above.

" It consisted of two parts—one made by O'Brien " himself and the other *by the bank, as his em-* " *ployer*. In the first O'Brien states that he has " never been in arrears or default in his present " employment; that his accounts were last ex- " amined by the bank examiner, and that they were " found correct. In the second Collins, *acting for* " *the employer, and signing as president of the* " *bank*, states that O'Brien has always performed

" his duties in a faithful and satisfactory manner; " that on March 28, 1891, his accounts were ex- " amined and found correct in every respect; that " he was not in arrears or default, and that noth- " ing was known affecting his title to confidence, " and no reason why the bond for his fidelity " should not be issued."

Now, there is not a particle of evidence but what O'Brien's accounts were examined on the 28th March, 1891, or that they were not found correct in every respect, or that he was then in arrears or default. There remains, then, to be considered the statements that " O'Brien has always performed " his duties in a faithful and satisfactory manner; " that nothing was known affecting his title to " confidence, and no reason why the bond for his " fidelity should not be issued."

The only evidence about O'Brien's acts prior to the first of July, when this statement was made, is of two things.

In June, 1891, Collins appeared in Denver with three certificates of deposit of the California National Bank—one for $10,000 and two for $7,500 each. Using these as collateral he borrowed $25,000 of one Wood (fols. 244–250) and received the proceeds in a draft for that amount on Chicago —made by the First National Bank of Denver (fol. 250). Collins took this draft to the Denver National Bank, and there with it he paid a debt of his own of five thousand dollars, and he put the remaining twenty thousand to the credit of the California National Bank in the Denver National (fols. 253–259). This was on the twelfth of June. The twenty thousand was subsequently remitted to New York for account of the California National

(fol. 259). So the bank got twenty thousand dollars of this money and Collins five thousand. The certificates thus used were dated the twenty-fifth of May. There was found among the cash a check of Collins of the same date and amount—drawn "to the order of C D" (certificates of deposit) (fol. 625). The check had not been charged to Collins' account (fol. 181).

The certificates were signed by O'Brien, and that is all the proof of his connection with the matter. Now, the jury could have found from this that O'Brien knew nothing of the transaction. That he had simply left a lot of signed certificates in a book, and that Collins had had them filled out and had used them, or the jury may have found that the certificates were given by O'Brien to Collins to be used for the purposes of the bank; as to the extent of four-fifths of their proceeds they actually were so used. This, as the counsel for the plaintiff in error said in his brief in the court below was common practice, and O'Brien may not have found out about the use of the five thousand dollars by Collins for his private purpose until after the first of July—there were but nineteen days.

The other matter is this: On the sixth of June, 1891, O'Brien put to the credit of Collins in the California National $20,000, writing on the deposit slip: "By Teleg. Nat. Park Bk." (fol. 633), and this amount was posted to the credit of Collins' individual account in the ledger (fols. 829, 216). On the third of June Collins had effected a loan of that amount from the Park Bank to the California National upon a note of the latter bank (fol. 637), the proceeds of which had been placed to the credit of the bank in the Park Bank (fols. 222-4), and

the California bank drew out the money. This was on the sixth of June, but twenty-four days before the statement was made. This was the first time, so far as appears, that O'Brien had done such a thing. This was afterwards charged back to Collins' account (fols. 384–386). Of course, the jury could have found that it was O'Brien who charged it back.

If upon this evidence the plaintiff in error would have had a right to have a verdict directed, then we would have had a right to have a verdict directed upon the principal claim, which is absurd.

The most which can be said is that the evidence is of such sort that the jury could have found upon it either way.

The verdict of the jury has, therefore, established the fact to be that O'Brien had done no wrong act at the time of the making of the statement, but had up to that time been always faithful.

c. Collins does not at all profess to have made the statement in the name of or on the part of the bank. It runs entirely in the first person, expressing his individual belief.

III.

The requests were properly refused.

The *thirty-third* request:

"If the jury find upon the evidence that Collins "acted for the bank in procuring the bond sued "on, and that before procuring this bond he had

"been guilty of dishonest and fraudulent conduct "in connection with his duties as president, and "that this fact was known to O'Brien, but was "concealed from the surety company, then there "can be no recovery in this action."

The jury *could not* "find upon the evidence that Collins acted for "the bank in procuring the bond sued on," for the reasons above given, *i. e.*: 1. That it was not within the scope of his powers as president; and 2. That it was not within the powers of the whole bank.

Collins' "dishonest and fraudulent conduct" has nothing to do with the matter. The representation was not as to *Collins*, but as to O'Brien.

The *thirty-fourth* request:

"If the jury find that at the time of making "application for or receiving the bond in suit, *any* "*person* acting for the bank represented to the "surety company that the accounts of the cashier "O'Brien had been examined and had been found "to be correct, *and the surety company relied* "*upon such representations* when in truth those "accounts showed that prior to this time *Collins* "had been guilty of dishonest and fraudulent con- "duct in his connection with his duties as president "of the bank, then there can be no recovery in this "action."

If *Collins* had been guilty "of dishonest and fraudulent conduct in "his connection with his duties as president of the bank" the "accounts," if "correct," ought to show it, and if they *did* show it, there was not any misrepresentation.

There was not any evidence of any representation by anybody but Collins. Collins could not have acted "for the bank" in making the representation for the reasons above given, *i. e.*, 1. That it was not within the scope of his powers as president; and 2. That it was not within the powers of the whole bank.

Whether the surety company "relied upon such representations" or not does not make any difference. It did not have any *right* to rely upon them. It was bound, at its peril, to ascertain whether Collins had authority.

United States *v.* Bank of Columbus, 21 How., 356.

"No authority *short of the most certain* should be taken to establish "the representative character of any one for a private company or "corporation to enter into a contract with the Secretary."

The *thirty-fifth* request:

"If the jury find that at the time of making ap-

"plication for the bond in suit *any person* acting "for the bank falsely and fraudulently, and with "knowledge to the contrary, represented to the "surety company that the accounts of the cashier "O'Brien had been examined and had been found "to be correct, when in truth those accounts "showed that prior to this time *Collins* had been "guilty of dishonest and fraudulent conduct in "connection with his duties as president of the "bank, then there can be no recovery in this "action.

This is the same as the last.

The *thirty-sixth* request:

"If the jury find upon the evidence that the "bond in suit was procured by concealment or "misrepresentation of any facts showing prior "dishonest or fraudulent conduct on the part of "O'Brien, then the plaintiff cannot recover, *no "matter who was guilty of such concealment or "misrepresentation.* The bank cannot now en- "force the bond without being affected by the "consequence of such concealment or misrepre- "sentation."

That is to say if a street beggar in New York, who had never had any connection with the bank, but, who represented to the surety company, not that he was acting for the bank, but that by some means he had become acquainted with all its affairs, had made the misrepresentations and concealed things, and the officers of the surety company had seen fit to rely upon it, that would be a defence.

There is not any evidence of anybody making any representation except Collins. The surety company was bound to know, not only that Collins had not any authority, *but that all the bank officers and stockholders put together had not any authority or power to make any such representation so that it could bind anybody but their individual selves.* This is a question of creditors. Of course it is quite unnecessary to remind the Court that it was the *duty* of the trial judge to refuse requests not based on evidence—even though they be abstractly correct—because they might confuse the jury.

IV.

The exception to the charge is not well taken.

It is only that Collins' "*knowledge*" did not bind the bank.

Upon this the entire charge had been as follows: (Fols. 566–8). "A defense has been interposed to which I must call your attention. It is said that this bond of indemnity was obtained upon an application which was certified to by the bank itself, and that in the application facts were misrepresented and facts were concealed—with fraudulent intent on the part of the bank; therefore that the bond is void. The application was accompanied by a certificate of Collins, the president of the bank. The only knowledge of any facts which ought to have been communicated, or were misrepresented, the only knowledge which the bank possessed at the time that application was made was the knowledge of Collins himself. Ordinarily a corporation, like any other principal, is chargeable with the knowledge of any facts which are known to its agents; but in this case all these transactions, if there were any transactions of a fraudulent and dishonest character on the part of the cashier, were transactions for the benefit of Collins, and he was a participator in the fraud, and under those circumstances the law does not infer that the agent or the officer will communicate the fact to his principal, the corporation, and under such circumstances the corporation is not bound by his knowledge. So this defense melts away and there is nothing of it whatever."

And to this the defendant took the following exception.

(Fol. 581). "Mr. Strong: And lastly, your "Honor's instructions, that because Mr. Collins "was the offender, if there were any offender, "therefore his knowledge did not bind the bank."

And it was in relation to proofs which are thus stated in the opinion of the Court of Appeals (fol. 342). "It is unnecessary to multiply references, "for in none of the cases cited on the brief of either "side, nor in such as have come to the knowledge "of this Court in its investigation of the case at "bar, are the facts sufficiently analogous to make "the citation especially persuasive. It may be well "to restate them, thus limiting the application of "this decision. The president of a national bank "concocts a scheme to purloin its funds, and find-"ing it necessary, in order to accomplish his pur-"pose, to secure the assistance of the cashier, "induces him to enter into the plot. The abstrac-"tion of the bank's funds is accomplished by "means of false entries on the books which deceive "the bank examiner, by means of the issue of false "certificates of deposit, and by the payment of "checks of the main conspirator which are not "thereafter charged against him. After these "fraudulent practices have gone on for some time, "it becomes necessary to file with the bank security "for the fidelity of both parties to the scheme. "The bank does not select the surety; the two "employees, so far as appears, are free to choose "whom they please, provided only that the surety "be of sufficient ability to respond. Under these "circumstances both the dishonest employés in-"dividually apply to the same person to become

"their surety, such person being a company, which, "in some instances, requires a certificate of the "good character of the employé to be given by "the employer before it will consent to underwrite "the honesty of such employé. In some instances "it does not require such a certificate; in Collins' "case it became his bondsman, with no certificate "from any one but himself personally. The giving "of certificates of good character of its employés "is no part of the ordinary business of a bank; "there is nothing to show that the president was "ever authorised by the bank or the board of "directors to act for the bank in making such a "certificate, nor that the bank, either when the "surety was applied to or when the bond executed "by it was delivered to the bank, was informed "that any such certificate was required. The "authorities are not favorable to the assumption "of any species of executive power by a bank presi- "dent without direct authority (Morse on Banks "and Banking, [2d ed.], 143); but there are many "acts which the president of a bank may do with- "out express authority of the board of directors, "in some cases because usage of the particular bank "impliedly authorises them, in other cases because "such acts are fairly within the ordinary routine "of his business as president. The making of "statements, however, as to the honesty and fidel- "ity of an employé for the benefit of the em- "ployé, and to enable the latter to obtain a bond "insuring his fidelity on the strength of such "representations, is no part of the ordinary routine "business of a bank president, and there is noth- "ing to show that by any usage of this particular "bank such function was committed to its presi- "dent.

"We have reached the conclusion, therefore, "that plaintiff's right of action on the bond was not "lost because its president, Collins, made to the "defendant false representations as to the cashier's "honesty. When two officers of a corporation have "entered into a scheme to purloin the money of a "corporation for the benefit of one of them, in "pursuance of which scheme it becomes necessary "to make false representations to a third person, "ostensibly for the bank, but in reality to consum- "mate said scheme and for the benefit of the con- "spirators, and not in the line of ordinary routine "business of such officers and without express au- "thority—the corporation being ignorant of the "fraud—the officers are not, in thus consummating "such theft, the agents of the corporation."

This exception is not well taken.

In *Wardell* v. *Railroad Co.*, 103 U. S., 651, 658, the Court said (p. 658): "It is among the rudi- "ments of law that the same person cannot act "for himself, and at the same time, with respect "to the same matter, as the agent of another "whose interests are conflicting," and further on the Court says that this rule applies to directors and officers of corporations.

In *United States* v. *City Bank of Columbus*, 21 How., 356, the charge of the trial court was (p. 363) "if they should find that the letter written by "Moo[illegible] was his own act, and had been given "without the knowledge, or authority of the "board of directors, or any of them individually, "*except Miner*, and that the agency of Miner was "not constituted by or known to the board of "directors, or the directors individually, or any of "them *except Miner*," etc.

If the knowledge of Miner had been the knowledge of the bank, this charge would have been erroneous.

Mr. Morawetz thus states the rule and collects a large number of the adjudged cases. Private Corporations, § 540. "Upon similar grounds, it has "been held that, when an agent of a corporation "himself contracts with the company, or otherwise, deals with it in a transaction, in which his "interests are opposed to the interests of the company, his knowledge will not be deemed the "knowledge of the company, as to matters connected with that transaction."

In *Re Marseilles Extension Company*, LR 7 Ch 161, the lord justice James said, (p. 170): "Is "it to be imputed to the banking company that "they have knowledge of every thing the director "knows about his own private affairs? Such "a proposition seems to be most unreasonable."

Citations to the same effect might be multiplied to a very great extent.

V.

No errors were committed in the admission of evidence.

The errors alleged are three:

1. *The ledger account and the teller's book.*

The ledger account is Collins' deposit account (fols. 820–835). It was proved by the bookkeeper who had kept it and who had made every entry in it except the last two, which were made long afterwards by the bank examiner, and the presence of which was explained (fols. 143–5). This made it admissible.

> Insurance Co. *vs.* Weide, 9 Wall., 677.
> Insurance Co. *vs.* Weide, 14 Wall., 375.
> Bates *vs.* Preble, 151 U. S., 149, 155.
> The Mayor of New York *vs.* The Second Ave. R.R. Co., 102 N. Y., 572, 578.

"There is no doubt that books of account kept "in the usual and regular course of business, when "supplemented by the oath of the party who kept "them, may be admitted in evidence. *Insurance "Co.* vs. Weide, 9 Wall., 677; *Cogswell* vs. *Dol-"liver*, 2 Mass., 217; *White* vs. *Ambler*, 8 N. Y., "170."

Nor is it beyond question but what in this instance the account is the primary, and not secondary evidence. Of course the primary evidence of each transaction on the debit side would be the cheque and the oath of the teller who paid it. Cheques, when paid, are returned, and are consequently the sort of things of which parol evidence

can always be given without making any foundation for it.

This is well settled in New York.

Chrysler *vs.* Renois, 43 N. Y., 209.
Grover *vs.* Norris, 73 N. Y., 473, 480.
Daniels *vs.* Smith, 28 State Rep., 351, 352.

The primary evidence on the credit side would be the oath of the teller where the deposit was currency; his oath and the cheques where the deposits were cheques. These cheques also would be returned. Then there are the deposit slips which we have in proof in this case (fol. 634). These also are of the sort of things of which parol evidence can always be given without making any foundation for it.

Now when a cheque is presented to the teller for payment, the only means which he has of ascertaining whether the account is good for it, is this account. The cheques charged as well as the cheques credited have been returned. Assuming the memory of the teller to be preternatural enough, it would give him each transactien in which he had participated, but it would not give him those in which he had not participated, nor would it give him the balance. Why is not the ledger, which is the first and only record, the primary evidence?

The cases cited in the brief which the plaintiff in error used below have no application. In both of them the books were rejected for want of the proper preliminary proof, and solely for that; and in *Rudd* vs. *Robinson*, the rule that books kept in the ordinary course of business, where proved by the person

making them, are admissible, is expressly approved—126 N. Y., 117, 119, 120.

Nor are the facts stated in the brief in regard to this matter quite correct. Brimhall, the bookkeeper, who proved the account, *did* make *all* the entries in it except the two final ones made by the bank examiner. He testified that there was another bookkeeper, Rogers, who also worked with him on the ledger (fol. 147), but that upon this account *he*, Brimhall, *made all the entries* (fols. 143, 145–6). "I kept the ledger account of that bank in the "year 1891 as such bookkeeper, *and kept the ac-* "*count of J. W. Collins with that bank*" (fol. 143).

"This account contains the *correct* account of "the transactions of Mr. Collins with the bank. "*The entries were made by reason of checks of* "*Collins that were handed to me, and the credits* "*were obtained from the tags which I received*, "and they were entered at about the dates "thereof for the amounts as stated" (fols. 145–146). Nor is it correct to say that the witness had no personal knowledge of the transactions. *He had personal knowledge of Collins' cheques*, which made up the whole of the debit side of the account. He knew Collins' handwriting, and as for the cheques themselves, it has already been shown that parol evidence may be given of them without foundation, *and this witness gives it*. He had also personal knowledge of O'Brien's two deposit slips of the 13th October (167–171) and swore to it. Nobody cares anything about the other credits except to ascertain that they do not sufficiently exceed the amount of the cheques to neutralize the forty-five thousand dollars of the false credits of October thirteenth, and that can be determined from a

simple inspection. It makes no difference who made them nor whether they were true or false so long as there were not enough of them.

But, as already said, they were good evidence.

In this case the teller was dead, and the proof was therefore the best of which, in the existing state of things, the matter was susceptible. The proof of the teller's death was as good under the circumstances as his oath would have been had he been alive.

> *Nichols* vs. *Webb*, 8 Wheat, 326, 337.
> *Chenango Bridge Co.* vs. *Lewis*, 63 Barb., 111; approved in *Rudd* vs. *Robinson*, 126 N. Y., 117, 119.

The matter of the teller's book is very different. The entries of two days were put in evidence (610–621) to show that nothing was paid on those days for certificates of deposit. This is the only way in which it could be proved, because this is the only place in which it could have been put down. They should have been put upon this book and they are not there. It does not make the least bit of difference who made the entries or whether they were true or false. They are of the *things done*, or rather not done, and therefore admissible. Greenleaf, § 120. If there had been no transactions recorded that day and the page had been blank, it would have been equally admissible and equally conclusive.

But if they need to be proved, they are proved. The items on the lower part of the page, which are the important ones, both because they are the ones which show what we wanted to, and also because all the others enter into and are summed up in

them, are proved to be in the handwriting of the teller (fols. 172–178), and the teller is dead. This makes them admissible.

Nichols vs. *Webb*, 8 Wheat., 326, 337.
Chenango Bridge Co. vs. *Lewis*, 63 Barb., 111; approved in *Rudd* vs. *Robinson*, 126 N. Y., 117, 119.

And lastly—The matters are of no possible consequence. The court took the issue, of which the latter day's entries were a part, away from the jury.

The former one is the matter of O'Brien's making the certificates of twenty-fifth May given under Point II.

2. *Evidence as to alleged prior frauds.*

This was admissible as bearing upon O'Brien's knowledge of what he was doing.

N. Y. Mutual Life Ins. Co. *vs.* Armstrong, 117 U. S., 591, 598.

3. *The extent of Collins' indebtedness to the bank.*

Its legitimate bearing on the transactions was upon the fraudulent or dishonest intent of O'Brien. If Collins had owed nothing and been responsible, an act entrusting him with some of the monies of the bank would have been very different in its nature and consequences, and consequently in its intent.

N. Y. Mutual Life Ins. Co. *v.* Armstrong, 117 U. S., 591, 598.

There was no incompetent evidence of this matter admitted.

The account (fols. 733–819) was neither introduced nor used to show Collins' indebtedness. That had already been proved by the testimony of the expert, which was not even objected to (fol. 313).

The account was put in as a part of the correspondence, *and as a notification to the Surety Company of what the receiver claimed, so that it might examine for itself. It did so examine, by its own expert, who went twice to San Diego for the purpose, and had full access to the books* (fols. 508–512), and the only inaccuracy claimed as the result of those two examinations was in a single item of ten thousand dollars (fols. 494).

The difficulty about getting it in evidence (fols. 376–383) was not at all because of its incompetency, but because of the difficulty of proving a copy, the Surety Company having failed to produce the original.

The judgment should be affirmed.

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